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THE ADMINISTRATIVE POWERS OF THE PRESIDENT

IT is the purpose of this paper to discuss, with some effort at systematic classification the powers of the President of the United States, through which he maintains an effective and responsible control over the whole federal administration. The position of the President in this respect offers a striking contrast to that of the state governors, which is not always fully appreciated in comparisons of the state and federal governments; and an analysis of the President's authority may well suggest some inquiry as to the relative merits of the centralized executive of the federal government, and the decentralized and unorganized executive branch of the state governments. It is significant, also, that the recent tendency in municipal organization in this country is toward placing the mayor in a position of equal, if not greater, power and responsibility than the President. This tendency, and the evident need for some better organization of the state executives, added to the importance of the subject itself, would seem to make worth while a careful examination of the President's authority.

To avoid any possible misunderstanding, it may be well to state distinctly at the outset that it is not proposed to consider the entire scope of Presidential authority. Those constitutional powers by which the President exercises some control over the meetings of Congress and over congressional legislation are purposely omitted; and the discussion is confined to his powers of an administrative character.

The various administrative powers of the President may be considered in two main divisions: On the one hand he has certain general powers over all branches of the federal administration; and on the other hand, he has more specific and additional authority over some particular branches of administration. In the first group are included his control over the personnel of the administrative services, through his power of appointment and removal; and his authority over the activity of the administrative officers and agents, based on his constitutional power to take care that the laws are faithfully executed, and exercised by the issue of directions and executive regulations. In the second group are included the special authority conferred by the constitutional provisions in reference to foreign relations, the command of the army and navy, and the power of pardon. Each of the administrative powers will be considered in turn.

I. GENERAL ADMINISTRATIVE POWERS

Power of Appointment.—The Constitution of the United States provides that the President

“Shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments. The President shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.”

In other clauses, the Constitution provides for the election of President, Vice-President, presidential electors, members of the Senate, and members of the House of Representatives. It also gives to each house of Congress the exclusive power to choose its own officers. These positions are, therefore, exempted from the Presidential power and entirely beyond his control. The offices to be filled by the President must in most cases be created by law of Congress. Even in the case of the Supreme Court, which is specifically established by the Constitution, the number of judges is left to be determined by Congress. In laws creating offices, Congress may, and usually does fix the length of term (except for the judiciary), and the compensation, allots the powers and duties, and prescribes general conditions. It also decides whether appointments are to be made by the President and Senate, or by the President alone, the courts of law, or the heads of the departments. But in no case can Congress itself take any positive step towards filling an office except those connected with its own organization, nor can it confer the power of appointment upon any one not mentioned in the Constitution.¹

What class of positions come within the term “inferior officers” has never been carefully defined, and probably cannot be determined with exactness.² The question has never become serious because Congress has shown no tendency to prescribe any of the alternative methods of appointment, except for distinctly subordinate and unimportant positions. Thus, not only the heads of the great departments, but also the heads of bureaus and important local officers—such as revenue collectors and postmasters, in cities—

¹ *United States v. Germain*, 99 U. S. 508,

² *Collins v. U. S.* 14 Ct. of Claims, 569,

are appointed by the President and Senate. The number of officers selected by this method has naturally shown a steady increase. In the time of Jefferson the number of Presidential offices was about 400; at the inauguration of Jackson there were over 600; and when Lincoln became President the number was about 1,500. At the present time there are more than 6,000 Presidential offices in the civil service, with an aggregate salary of \$12,000,000 a year.¹

Moreover, the great bulk of these Presidential offices hold only for four-year terms, and are thus automatically vacated for new appointments during each Presidential term. This system of four-year terms, was introduced by the Tenure of Office Act of 1820, which prescribed this period for district attorneys, collectors of customs, and other financial officials. In 1836 the short-term rule was extended by statute to the more important postmasters. And at the present time the four-year period is in practice almost universal, since where it is not applied by statute, it is recognized by the custom of resignations, or may be enforced by the exercise of the power of removal.

In exercising this enormous power of patronage, the President is not limited by any legal requirements, established either by statute or by standing executive regulations, governing the qualifications of candidates. The civil service examination system, governing the selection of candidates for subordinate and technical posts, does not affect the positions filled by the appointment of the President and Senate. Indeed, statutory qualifications would probably be considered an infringement on the constitutional grant of the appointing power; and some have professed to believe that even executive regulations could not be applied to positions of this kind.

The President's power of appointment is, however, restricted by the participation of the Senate; and to comprehend the significance of the President's authority it is necessary to examine the influence exercised by the Senate. Some of the opponents of the Constitution feared that the President, through his power of nomination, would

¹ See summary in *Forum*, Vol. 31, p. 25—

State Department, 318 offices, aggregating.....	\$ 1,000,000
Treasury " 743 " "	617,355
Post Office " 4015 " "	6,931,000
Interior " 747 " "	1,997,640
Judiciary, " " "	1,126,000
	<u>\$11,671,995</u>

have full control over appointments; and that an ambitious man, supported by his own appointees in office, might retain possession of the Presidency after the expiration of his term.¹ The friends of the Constitution argued that the power of the Senate would act as a restraint on the President; but at the same time they believed that the power of nomination would place the primary responsibility on the President, and that this would tend to secure good appointments.

In the early days of the federal government an attempt was made to limit the President's power over appointments. It was urged that the right of the Senate to advise appointments could only be accomplished by suggesting names to the President, from which he might make nominations, to which the Senate would have to consent before the definitive appointment could be made. This method, by giving the Senate the right of initiative and the power of ratification, would virtually have made the Senate the sole appointing power. This interpretation was so clearly contrary to the intent of the Constitution that it was never accepted, and the Senate collectively acts on appointments only after nominations have been submitted.

But, while the Senate as a body does not control nominations, the individual Senators—of the same party as the President—have come to wield a large influence in this field, and in some cases almost dictate nominations for local positions. This influence of the individual Senators has developed through the custom of "Senatorial courtesy," whereby the Senate will refuse to consent to a nomination which is opposed by a Senator from the state concerned, and this opposition is almost certain to develop if the recommendation of the Senator has not been accepted by the President. Thus, for local positions, it is often the case that the primary selection is made by the Senators, or for less important positions by members of the House of Representatives, and the President merely exercises a power to reject unfit persons. To a large extent some such procedure is an almost necessary result of the great number of positions now filled by Presidential nomination. It is impossible for the President to have personal knowledge of the applicants for local offices; and since he must rely on some one else for advice, it is natural that he should give weight to the recommendations of the Senators and Representatives.²

¹ Elliott's Debates, I., 379.

² Harrison: *This Country of Ours*, 109.

For some positions, however, the President exercises a much larger personal control. The heads of the Executive departments, who form the Cabinet, are in most cases personal selections; and the Senate confirms nominations for these offices as a matter of course. And in making nominations for the more important offices, particularly in the diplomatic service, the President exercises a large degree of independent judgment. Probably the President makes personal selections for as many positions as it is possible for one man to make with due consideration.

At the same time it must be recognized that the custom of allowing the members of Congress to select local officers, gives them a control over the administration not contemplated by the Constitution, and far from satisfactory in practice; while the President's exclusive power over the formal nominations tends to induce the members of Congress to support legislative measures favored by the administration, in return for patronage favors. There is probably no specific agreement to trade votes for appointments; but the influence of existing customs certainly violates the spirit of the constitutional separation of powers.

To correct this misuse of the Presidential appointing power is not an easy matter, which can be fully accomplished by promulgating a legal rule, either in the form of a statute or of an executive regulation. The positions affected are of a distinctly different character from those in the subordinate classified service now filled by means of competitive written examinations; and call for qualifications of business capacity which cannot be thoroughly tested by that method. A system of higher grade examinations based on a professional university course in law, economics and public administration, such as is followed in Germany, could undoubtedly be devised, and could be so adapted to American educational methods as to avoid any possible danger of the bureaucratic spirit. But even such a system could be perverted to partisan purposes so long as present notions as to the political nature of Presidential appointments prevail. The fundamental change that must be made is the recognition and appreciation, both by the people at large and by the politicians, of the non-political character of the administrative offices.

Two suggestions may be made which, if adopted, would aid in emphasizing this non-political character of such offices and in reducing the scope of political patronage. If the four-year tenure law were replaced by the older system of appointment for indefinite

terms, the patronage at the free disposal of any administration would be reduced to a fraction of what it now is. And if the appointment of local officers could be transferred from the President and Senate (both essentially political organs) to the heads of the departments, who are more directly responsible for the efficient conduct of their respective departments, administrative qualifications would receive larger consideration than is now given them. Such a decentralization of the appointing power would not take from the President any control which he personally exercises; but would be simply a recognition that the number of appointments is far larger than the President can select in person, and would transfer the responsible power of appointment to an administrative officer, who would be less dependent on the advice of members of Congress. Not only would this action tend to better the character of the administrative service; but the reduction of Congressional patronage would tend to eliminate a serious corrupting influence from the Congressional elections.

It may be added that still further decentralization in appointments may become advisable in the future as a counterbalance to the growing centralization in legislation and the scope of the federal administrative service. Certainly if the constitution should be amended to give Congress larger powers, there should at the same time be amendments providing for some decentralization of the federal administration. This might be accomplished by giving the state governors the power of appointment to local federal offices, a method that would secure the advantage of local knowledge and at the same time continue the method of appointments by an executive official.

None of these proposals is intended to suggest any limitation on the President's power of removal. That power, as will presently be seen, is what gives him the effective control over the whole administration which he should continue to hold. Moreover by separating the power of removal from the power of appointment for local offices, and reserving the removal power to the President, a further remedy is provided against the abuse of the appointing power for partisan or personal purposes.

Power of Removal.—The Constitution provides for removal from office by the process of impeachment and contains no other mention of the power of removal. Under the strictest construction of the Constitution, it might be urged that there is, therefore, no other method than impeachment by

which administrative officers could be removed.¹ But from the time the question was raised, it seems to have been admitted that there is a larger power of removing officers whose terms were not explicitly prescribed by the Constitution. By whom such removals might be made was a question answered in different ways. There are three possible alternatives: it might be a power vesting in the President alone; it might vest in the President with the advice and consent of the Senate; Congress might have the right to designate who should exercise the power.

In the first Congress the matter was thoroughly discussed. The bill for establishing a department of foreign affairs provided that the head of the department should "be removable from office by the President of the United States." Discussion at first arose in the House of Representatives on the question whether the President alone or the President and the Senate had this power under the Constitution. Hamilton in one of the *Federalist* papers had stated that the consent of the Senate would be necessary to displace as well as to appoint. It was now urged that removal from office was part of the appointing power, that the Senate had by constitutional authority the same share in removals as it had in appointments, and that it was unconstitutional to attempt to confer the power on the President. There was also some opposition to the clause on the ground that a President might abuse the power for partisan and political ends. In opposition to this view, it was contended that the appointment and removal of officers are essentially executive acts; and that while the President's power over appointments was specifically limited by the Constitution, there was no limitation on his power to remove. Madison supported the President's power of removal; and replied to the charge that he might abuse the power, that wanton removal of meritorious officers would subject him to impeachment and removal from his own position. The motion to strike out the clause, which had been supported by those who favored Senate participation, was defeated by a vote of thirty-four to twenty.

It was next pointed out, however, that the clause did not rest the President's authority on the Constitution, but attempted to confer the power on him by legislative enactment; and it was urged that it was both useless and improper for the Congress to grant a power already conferred by the Constitution. Accordingly, the original clause was withdrawn: and in another part of the bill a provision

¹ This would not restrict the power of removing subordinate agents and employees below the rank of "officers."

was inserted for filling vacancies, "whenever the said principal officers shall be removed from office by the President of the United States, or in any other case of vacancy." This was understood and accepted as a positive declaration that the right of removal was conferred on the President by the Constitution.

In the Senate there was strong opposition to the provision in the House bill, but eventually it was adopted by the casting vote of the Vice-President. And during the same session of Congress, bills organizing the Treasury department and the War department, containing precisely the same provisions, were passed by both houses.

This action took place in 1789. For 78 years the interpretation of the Constitution then accepted was followed without question. Then during the quarrel between Congress and President Johnson an act was passed for the express purpose of preventing removals by the latter. This Tenure of Office Act of 1867 distinctly repudiated the construction formerly given to the Constitution, but does not clearly assert whether the power of removal resides in the President and Senate under the Constitution or that Congress has control over the subject. It declared that removals to be valid must be consented to by the Senate, that during the recess of the Senate the President could do no more than conditionally suspend an officer, and that only for good cause; and that he must report all suspensions for the approval of the Senate within twenty days after the beginning of a new session.

Two years later, when President Johnson was succeeded by President Grant, the law of 1867 relating to removals and suspensions was amended by additional legislation. In the new statute, the President was permitted to suspend officers "in his discretion," instead of only on certain specified grounds. Where the former law had provided that a suspended officer should resume his office if the Senate refused to concur in the suspension, the statute of 1869 simply provided that if the Senate refused to confirm an appointment in place of a suspended officer, the President should nominate another person for the office.¹ This latter arrangement would seem to make the President's power of suspension equivalent to the power of removal, although the use of the word suspension is somewhat equivocal. Evidently President Grant was not entirely satisfied; for in his first annual message to Congress he complained of

¹ The Attorney-General held that if the Senate adjourned before confirming a nomination in cases of suspension, the suspended officer became reinstated, but could be again suspended. 15 Opinions Atty.-Gen. 376.

the law of 1869. But as the President and Senate were now in political accord no difficulties arose; and the statute was allowed to remain. Nor did any trouble arise until on the inauguration of President Cleveland in 1885, the President and the majority of the Senate were again politically opposed.

During the session of Congress in the winter of 1885-6, the Senate delayed action for several months on a large number of nominations made by President Cleveland to fill vacancies caused by suspensions during the preceding recess. During this period the Senate endeavored to obtain from the executive departments information as to the causes of the suspensions, and this information the executive departments, under direction of the President, declined to furnish. The President claimed that suspension was a purely executive act with which the Senate had no concern. The Senate asserted in a Resolution that it was "the duty of the Senate to refuse its advice and consent to proposed removals of officers" when the documents and papers in reference to supposed official misconduct were withheld by the Executive. The President maintained his position; and eventually the Senate confirmed the nominations to fill the vacancies.¹

At the next session of Congress, an Act was passed repealing the Act of 1869 amending the Tenure of Office Act of 1867. This Act of 1887 repealed the provision requiring the submission of suspensions to the Senate, and thus restored the original interpretation of the President's unlimited power of removal. According to the earlier and present construction, the Tenure of Office Acts of 1867 and 1869 were unconstitutional, since they were based on the theory that Congress had the power to determine how removals should be made. But as the acts were never tested in the courts, there has been no judicial interpretation on this point.

In a very recent case, however, the Supreme Court has shown that it does not consider the President's power of removal restricted by an Act of Congress defining certain causes for removal. An Act of 1890 establishing the board of general appraisers provided that the appraisers were to be appointed for no definite term, but could be removed by the President for "inefficiency, neglect of duty or malfeasance in office." This board of appraisers has been called a customs administrative court; and it seems to have been the intention to give its members a tenure approaching in permanence that of the federal judiciary. In the states, a

¹ *Atlantic Monthly*, Vol. 86, p. 1.

provision authorizing removals for certain causes, is regularly held by the state courts to require a statement of charges and an investigation by the removing authority. When, therefore, an appraiser named Shurtleff was removed from his position without notice of any charges or cause for his removal, he brought the question as to the legality of his removal before the judiciary. But the Supreme Court decided that the provisions of the Act did not restrict the President's power of removal to the causes specified; but in addition, the President had the power of removal at will, and that no notice or hearing was necessary.¹

One important class of federal officers—the judges—are excepted from the President's power of removal by the Constitution. The provision that federal judges shall hold office during good behavior makes them irremovable except by the process of impeachment. But over all officers in the executive branch of the government, the President's power of removal is beyond question.

The extent to which the Presidents have exercised the power of removal is one of the most marked characteristics of American administration. Advocated as a necessary means to enable the President efficiently to discharge his duty to see that the laws are faithfully executed; the power has been used to make changes on a large scale at the beginning of every Presidential term, and in connection with the four-year tenure for many positions it operates to secure an almost complete change in the administrative personnel, whenever there has been a political change in the executive. While Madison held that removal of a meritorious officer would be a just cause for impeaching the President, removals for the sole purpose of creating a vacancy for a political supporter have come to be a frequent occurrence. It must be noted, however, that the custom of removals for political reasons, is a logical result of the system of political appointments.

It will be of interest to note the development in the practice of removals. Under Washington and Adams there was but little opportunity for political removals, and but few removals of any kind are recorded. Under Jefferson, there were about one hundred removals out of four hundred positions, the changes being defended on the ground that appointments had previously been confined to the Federalists. During the terms of Madison, Monroe, and John Quincy Adams which involved no change in political control, the number of removals was comparatively small, aggregating about

¹ *Shurtleff v. U. S.*, 189 U. S., 311.

sixty for the period of twenty years. When Jackson became President in 1829, the pressure for appointments led to a very marked increase in removals; although the extent and significance of Jackson's action has often been much exaggerated. There were about two hundred removals in about six hundred Presidential offices.¹ When Van Buren succeeded Jackson, there were comparatively few removals; but after that time they were made in great abundance after each Presidential inauguration, even when there was no change in party control. The inauguration of Lincoln was marked by a larger proportion of removals than at any time previously. Nearly nine hundred out of fifteen hundred Presidential offices were vacated.² The continued success of the Republican party produced conditions favorable to a smaller removal rate until the inauguration of Cleveland in 1885. The quadrennial changes in party control during the next twelve years were followed by removals on a large scale.

It is very doubtful if the transfer of the power of removal from the President alone to the President and Senate would prove an effective remedy for this condition. The difficulty lies deeper, in

¹ The statement frequently made that Jackson made 2,000 removals during the first year of his administration is based on a rough estimate made by Senator Holmes of Maine, which obviously includes removals from minor posts; and the comparison of this figure with the removals from Presidential offices before Jackson's time is hardly just.

2 REMOVALS FROM OFFICES BY PRESIDENTS

American Historical Association, Report 1899, p. 84.

PRESIDENTS	Removals mentioned	Cause of vacancy not named	Failure to re-appoint	Appointments vice non-acting appointees	Appointments vice temporary appointees	Commissioned during recess	Total civil officers changed	Probable number of offices	Military and naval removals
Washington.....	13	4	1	1	1	1	17	1	6
John Adams.....	14	5	2	1	1	1	21	1	6
Jefferson.....	48	11	8	2	1	1	*109	433	15
Madison.....	4	20	2	1	1	1	27	824	89
Monroe.....	17	10	1	1	1	1	27	1	41
J. Q. Adams.....	5	2	4	1	1	1	12	1	11
Jackson.....	164	26	58	9	5	1	252	610	27
Van Buren.....	26	17	30	6	1	1	80	924	19
Harrison and Tyler.....	375	15	60	5	3	1	458	1	19
Polk.....	225	3	108	6	1	1	342	1	24
Taylor.....	44	17	43	8	1	428	540	929	11
Fillmore.....	45	5	13	2	1	23	88	1	14
Pierce.....	676	75	38	12	1	22	823	1	37
Buchanan.....	197	14	203	1	1	42	458	1520	28
Lincoln.....	862	25	46	11	1	513	1457	1	182
Johnson.....	455	200	142	25	10	71	903	2669	131
	3169	445	762	89	20	1089	5614		660

* Including 40 midnight appointments not recognized.

the prevailing custom of political appointments for positions which should be purely administrative; and until public opinion forces a change in the system of appointments, removals will inevitably be made on the same basis. Moreover it remains true, as it was argued in 1789, that the power of removal is indispensable to the President if he is to be held responsible for the administration and execution of the laws. And in addition to developing the system of political removals, from the power of removal there has been evolved in large measure, the President's effective power of direction and supervision over the entire national administration.

Power of Direction.—Not only does the President exercise much influence over the personnel of the administration through his power of nomination and removal, but he can also control and direct in large degree, the actions of the administrative officials. The constitutional provisions which authorize this power are those vesting the executive power in the President, and requiring him to take care that the laws are faithfully executed. But the principal means by which the President can make his control effective is the power of removal, the possibility of which will usually secure obedience to his orders, while if any official persists in disobedience his removal permits the appointment of some one who will carry out the President's wishes.

Although the authority to see that the laws were executed was clearly specified in the Constitution, and the power of removal was recognized from the first as belonging to the President, the early statutes organizing the administrative services did not always acknowledge the President's power of direction. In some cases the power of direction was expressly recognized, as in the acts organizing the departments of foreign affairs and of war; but in these branches of administration the President was given by the Constitution more specific authority, which could not readily be overlooked. On the other hand, the act of 1789, organizing the treasury department, contained no reference to any Presidential power of direction, and indicates that the administration of the finances was to be kept under the close supervision of Congress. The act provided that the secretary of the treasury should perform all such services relative to the finances as he should be directed to perform, while the context shows that the direction of Congress and not of the President was meant. Furthermore, the secretary of the treasury, unlike the other secretaries, was to make his report, not to the President, but to Congress. So too the postoffice service was

organized without any reference to Presidential control or direction.

The view thus negatively indicated that the President had but a limited power of direction, is more positively expressed in a judicial opinion in one of the federal courts as late as 1835:—

"The legislature may prescribe the duties of the office at the time of its creation or from time to time, as circumstances may require. If those duties are absolute and specific, and not by law made subject to the control or direction of any superior officer who is by law especially authorized to direct how those duties are to be performed, the officer whose duties are thus prescribed by law is bound to execute them according to his own judgment. That judgment cannot lawfully be controlled by any other person As the head of an executive department he is bound, when required by the President, to give his opinion in writing upon any subject relating to the duties of his office. The President, in the execution of his duties to see that the laws are faithfully executed, is bound to see that the Postmaster-General discharges 'faithfully' the duties assigned by law; but this does not authorize the President to direct him how he shall discharge them."¹

This opinion indicates the earlier conception of the President's power of direction. But even before it was uttered, it had been effectively overruled by the action of President Jackson in forcing the secretary of the treasury to remove the government deposits from the United States bank. Notwithstanding the semi-independent position given to the secretary of the treasury by Congress, and although the control of government funds was given specifically to that officer; when Jackson determined that they should no longer be deposited in the United States bank, he first transferred one recalcitrant secretary (McLane), and removed his successor, who also declined to act as the President wished, and finally secured one (Taney) who executed his wishes. There was strong opposition to this action on the part of the President, and the Senate passed a resolution of censure. But this did not alter the situation. The President had demonstrated his authority, and established a precedent; and so long as the power of removal is not restricted, it is clear that the President can in fact control the action of any administrative officer.

¹ *United States v. Kendall*, 5 Cranch, C. C. 163, 272. Cf. also *Kendall v. U. S.*, 12 Peters 610, where a more guarded opinion on the same point is given by Justice Thompson of the Supreme Court: "It by no means follows that every officer in every branch of that [the executive] department is under the *exclusive* direction of the President It would be an alarming doctrine, that Congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."

Since the time of President Jackson's action, the larger scope of the presidential power of direction has come to be more clearly recognized. Congress has added to the specific grants authorizing the President to direct the executive departments. Attorneys-General have presented opinions as to the President's authority, couched sometimes in extravagant terms. While the Supreme Court has clearly indicated that the President's authority is not limited to the express terms of Congressional statutes.

Under existing statutes the President has specific and positive authority to issue instructions and orders to the Secretary of State, the Secretary of War, and the Secretary of the Navy; to require the legal opinion of the Attorney-General,¹ and to cause even the Secretary of the Treasury to promulgate regulations for a special purpose.² He has also express authority to "call out the militia of any state or employ the land and naval forces to suppress rebellion against the United States, when the ordinary course of judicial proceedings is in his judgment impracticable."³

But in addition to these and many other detailed duties and powers imposed by statutes, the President issues directions and instructions in many cases not directly covered by any express provision of the statutes. Thus he has used the army for the protection of the mails without express statutory authority. And he has authorized a guard for the protection of a justice of the Supreme Court in the discharge of his duties.

Such extra-statutory authority of the President has been repeatedly supported by the Attorneys-General, and has been distinctly upheld by the Supreme court.

Perhaps the best general statement of the present situation in this question is the following quotation from an Attorney-General's Opinion, which is paraphrased from a Supreme Court opinion in reference to the authority of a head of a department:—

"The President 'is limited in the exercise of his powers by the Constitution and the laws; but it does not follow that he must show a statutory provision for everything he does. The government could not be administered upon such contracted principles. The great outlines of the movements of the Executive may be marked out, and limitations imposed upon the exercise of his powers, yet there are numberless things which must be done, which cannot be anticipated and defined, and are essential to useful and healthy action of government.'"⁴

¹ *Revised Statutes*, §§ 202, 216, 417, 354.

² Acts of 1890. c. 51.

³ *Revised Statutes*, § 5298-9.

⁴ 6 Opin. Attv.-Gen. 10,365; 8 Opin. Attv.-Gen. 343; 10 Opin. Attv.-Gen. 413; Cf. U. S. v. Macdaniel 7 Peters 14 (1833).

An extreme view of the President's power is given in an opinion by Attorney-General Cushing in 1855:—

"I think the general rule to be . . . that the head of a department is subject to the direction of the President. I hold that no head of a department can lawfully perform an official act against the will of the President, and that will is by the Constitution to govern the performance of all such acts. If it were not thus, Congress might by statute so divide and transfer the executive power as utterly to subvert the government and change it into a parliamentary despotism like that of Venice or Great Britain, with a nominal executive chief or President utterly powerless—whether under the name of Doge or King or President would then be of little account so far as regards the maintenance of the constitution."¹

Still another statement is given in the following:—

"The President in the exercise of his general administrative superintendence may interfere to restrain an officer from assuming an authority that does not belong to him, as he unquestionably may to compel the officer to perform a duty that does belong to him.

"In none of the other instances where the President's power was denied was the jurisdiction of the department officer in any degree involved; but merely the correctness of his official action in matters admitted to be within his competency."²

Not only have the Attorneys-General of the United States clearly approved of a Presidential power of direction in addition to that expressly authorized by statute; but the Supreme Court has in several cases recognized such extra-statutory executive authority. Thus the right of federal agents, acting under instructions from the Secretary of the Interior, to seize timber cut from government land, without any positive statutory authority for such instructions, has been upheld.³ So too, the right of the Attorney-General to institute a law suit where the United States had a just cause for action, even in the absence of any act of Congress expressly authorizing it, has been affirmed.⁴ And, again, it has been held that the power of the President to see that the laws are faithfully executed authorizes, without any express statutory grant, the designation of a deputy marshal as a guard to protect a federal justice from probable danger, and that a deputy marshal so assigned cannot be held responsible before any state court for any act performed in the discharge of this duty.⁵ Says Justice Miller, in this last case, "We cannot

¹ 7 *Atty.-Gen. Op.* 453, 470.

² 15 *Atty.-Gen. Op.* 101-102.

³ *Wells v. Nickles*, 104 U. S. 444.

⁴ *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 279, 280.

⁵ *In re Neagle*, 135 U. S. 1, 63, 67, 75.

doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death.'''

While the President thus has now a recognized and effective power of direction over executive officials, this is exercised mainly on his own initiative, and he does not entertain appeals from or exercise a power of revision over the acts of officials on matters within their competence. In the opinion of various Attorneys-General, the President has no power to correct by his official act the errors of judgment of incompetent or unfaithful subordinates, and there is no appeal to the President from the decision of the head of a department in such cases.¹ If this rule were not adopted the President would be overwhelmed with appeals on matters of detail and the transaction of public business would be seriously interrupted. Where, however, the question refers to the jurisdiction or competence of the subordinate officer, an appeal to the president has been allowed.²

Ordinance Power.—The President's control over the conduct of the federal administration is exercised in large measure by the issue of Ordinances or Executive Regulations. Owing to the much greater detail in legislative statutes, Executive Regulations are less important in the United States than the Ordinances of the German Bundesrath or the decrees of the French President, and even less important than the Orders in Council in Great Britain; but most writers have exaggerated the extent of Congressional control and underrated the field of executive regulation in the American federal administration. There are in fact many elaborate systems of executive regulations governing the transaction of business in all the various branches of the administration. These include organized codes of regulations for the army and navy, the postal service, the patent office, pension office, the land office, the Indian service, the customs, internal revenue and revenue cutter services, the consular service, and the rules governing examinations and appointments to the whole subordinate civil service. And in addition to these systematized rules there is an enormous mass of individual regulations, knowledge of which is limited to the few persons who have to apply them and to those whom they affect.

¹ Opinions of the Attorneys-General, 1: 624, 636, 678; 2: 481, 507; 4: 515; 5: 275, 630; 6: 226; 10: 526, 527; 11: 14; 13: 28.

² 15 Opin. Atty.-Gen. 100.

"It is difficult to form a true conception of the vastness and importance of all this great body of executive regulation law, controlling, as it does the administration of all the executive departments with its rules of action. And when we consider that these rules of action are in general made, construed and applied by the same authority, thus combining quasi-legislative, quasi-judicial and executive authority, we cannot fail to be impressed with the extent of the jurisdiction covered by them."¹

These executive regulations are sometimes issued in accordance with statutory provisions, sometimes without any express authorization as an exercise of the constitutional executive power. Regulations made pursuant to statutes are very common. Thus the President is specifically authorized to make regulations for the purchase and disposition of supplies for the navy, in relation to the duties of the diplomatic and consular officers, for admission to the civil service, and in reference to killing fur seals; he may suspend tariff duties on imports from countries which enter into reciprocity agreements; he is authorized to prescribe the uniform for the army; and he has explicit power to establish internal revenue districts, pension agencies and forest reservations.²

Other regulations, although not expressly authorized, supplement certain statutes, prescribing means for carrying them into effect in the absence of sufficient legislative regulation. Such regulations are often in the nature of interpretations of the statutes. The regulations governing the Revenue Cutter service are the most important example of this class; and are of especial significance, since they establish a penal system with a code of penalties and a system of procedure, all resting on executive action alone.³

Still other regulations are issued by the President by virtue of his special constitutional powers. In this group are the greater part of the army regulations issued by the President as commander-in-chief.

Most of the executive regulations are not issued directly by the President, but are prepared in the department concerned, and issued by the head of department. But regulations issued in this way are considered as the acts of the President, and he is regarded as responsible for them.

"The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. . . .

¹ G. N. Lieber: *Remarks on the Army Regulations*, p. 47.

² Revised Statutes: §§ 1296, 1549, 1752, 1753, 3141, 4778, 4780, *Acts of 1891* c. 561.

³ Lieber: *Army Regulations*, p. 46,

. . . We consider the act of the war department in requiring this reservation to be made, as being in legal contemplation the act of the President.'"¹

The most important executive regulations issued directly by the President are the Civil Service Rules and the Consular Regulations.

Two interesting legal questions have arisen concerning executive regulations. First, are they not legislative acts, and therefore beyond the competence of the executive, and beyond the power of Congress to delegate? Second, if they are constitutional because not acts of legislation, are they rules of law which will be enforced by the judicial courts, or is their enforcement secured only by administrative processes?

On the first question, federal judges have held, on the one hand, that Congress may delegate the power to make rules and regulations, and, on the other hand that this does not constitute a delegation of legislative power. These views would seem to be logically inconsistent with each other; and the inconsistency is not removed by pointing out the difficulty of drawing the line between legislative action and executive discretion. For Congress possesses only legislative power, and it would seem that any delegation of power by Congress must be a delegation of legislative power. If this view is correct, statutory authorizations of executive regulations are either a grant of legislative power, or they are not grants of power, but merely expressions of opinion by Congress that the details left for executive regulation are not legislative in character.

In some cases Congress has authorized executive regulations which approach very closely the field of legislative action. The most notable instance is in the reciprocity clause of the tariff act of 1890, which authorized the President to suspend other clauses of the act permitting the importation of certain commodities free of duties, with reference to goods imported from countries which imposed duties on American products deemed by the President to be reciprocally unequal and unreasonable. By this provision the imposition of duties was made to depend on the action of the President. The opinion of the Supreme Court as to the constitutionality of this power, in the case of *Field v. Clark*,² discusses previous instances of somewhat similar provisions, while the dissenting opinion of two judges serves to emphasize the point at issue.

It was shown that there were numerous instances where Congress had authorized the President to suspend the operation of certain

¹ *Wilcox v. Jackson*, 13 Peters 498, 513; see also *U. S. v. Eliason*, 16 Peters, 291.

² 143 U. S. 649.

statutes, under given conditions, and some cases where more positive authority had been conferred. The acts which gave the greatest extent of discretionary power to the President were the Embargo Act of 1794, and the Non-Intercourse Act of 1799. The former authorized the President to lay an embargo on shipping "when-ever, in his opinion, the public safety shall so require." The latter authorized the President to remit and discontinue the restrictions placed by the act on commercial intercourse "if he shall deem it expedient and consistent with the interest of the United States." These and other acts were cited as showing the Congressional interpretation of the question. But the only act of this kind which had received judicial recognition was the Non-Intercourse Act of 1809, which authorized the resumption of trade when the President by proclamation declared that France or Great Britain had revoked or modified the edicts violating the neutral commerce of the United States. This act was upheld by the Supreme Court¹ on the ground that the act of the President merely announced the condition or fact which the legislature prescribed as necessary to the resumption of trade.

Following this precedent, the majority of the court held that the clause in the act of 1890 also left to the President simply the determination of a fact or contingency upon which the suspension of free importation was to take effect.

"Congress itself prescribed in advance the duties to be levied. . . . The words 'he may deem' . . . implied that the President would examine the commercial regulations of other countries . . . and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions reciprocally unequal and unreasonable were imposed . . . it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. . . . The President was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect."

From this opinion Justice Lamar and Chief Justice Fuller dissented. It was urged that the legislative precedents could not bind the judiciary in interpreting the Constitution; and that the provision under consideration differed radically from that in the Non-Intercourse Act of 1809.

"It does not, as was provided in the statutes of 1809 and 1810, entrust the President with the ascertainment of a fact therein defined upon which the law

¹ *The Brig Aurora*, 7 Cranch, 382, 388.

is to go into operation. It goes farther than that, and deposes to the President the power to suspend another section in the same act whenever 'he may deem' the action of any foreign nation producing and exporting the articles named in that section to be 'reciprocally unequal and unreasonable;' and it further deposes to him the power to continue that suspension and to impose revenue duties on the articles named 'for such time as he may deem just.' This certainly extends to the executive the exercise of those discretionary powers which the Constitution has vested in the law-making department. It unquestionably vests in the President the power to regulate our commerce with all foreign nations which produce sugar, tea, coffee, molasses, hides, or any of such articles."

It will be noted that the difference of opinion was as to whether the powers conferred were legislative or not; and the view of the majority of the court throws open a wide field for delegated executive regulations. But the entire court accepted the view that Congress cannot delegate legislative power, apparently the first specific expression by the Supreme Court of a maxim uniformly held by the state courts.

Executive regulations not expressly authorized by statute depend either on the general executive power to enforce the laws or on special constitutional powers such as the command of the army. The power to establish rules to aid in the execution of laws seems to be clearly established by long practice; and some limitations on this power have been laid down by the courts. An executive regulation interpreting a statutory provision may be overruled as erroneous by the judiciary. And regulations which encroach on the legislative power have been declared void. Thus it was held that the Inter-State Commerce Commission had no power to establish a schedule of railroad freight rates, on the ground that this was legislative power which had not been clearly delegated to the Commission.¹ There is a slight implication in Justice Brewer's opinion on this case that if the power had been clearly conferred it might have been considered legal.

Army regulations issued by the President as commander-in-chief of the army have been repeatedly recognized as legal, notwithstanding the Constitutional provision giving Congress the power to make rules for the government and regulation of the land and naval forces.

"The power of the executive to establish rules for the government of the army is undoubted. . . . The power to establish implies, necessarily the power to modify or repeal, or to create anew. . . . Such regulations cannot be questioned or defied because they may be thought unwise or mistaken."

¹ 167 U. S. 479.

² U. S. v. Eliason, 16 Peters, 301. See also U. S. v. Freeman, 3 Howard 118; Gratiot v. U. S. 4 Howard, 118; Kurtz v. Moffit, 115 U. S. 503; Swain v. U. S., 165 U. S., 553.

Executive regulations can in most cases be effectively enforced through the President's control over the personnel of the administrative service; and having this sanction can be considered law in the broader sense of the word. The question has however arisen whether or not they are rules of law which will be recognized and enforced by the judicial courts; and the general reply may be made that while to a large degree they are so accepted by the judiciary, there are some limitations on this recognition. The Supreme Court has held distinctly that executive regulations prescribed in pursuance of express authority of Congress "become a mass of that body of public records of which the courts take judicial notice."¹ In another case it has been declared that:—

"Regulations prescribed by the President and by the heads of the departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen, where a statute does not distinctly make the neglect in question a criminal offense."²

A special form of this question on which the federal circuit courts have differed in their opinions, has been whether an injunction would be issued to prevent a removal from office, held to be in violation of a civil service rule prohibiting removals for political causes. In several such cases, it has been held that the civil service rules are merely administrative regulations, enforceable by the executive, which had ample authority to secure their observance; but that a court of chancery had no jurisdiction to compel their enforcement.³ In another case, however, another circuit judge decided that these rules constituted a part of the law which a court of equity had jurisdiction to enforce.⁴

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[TO BE CONTINUED]

¹ *Caha v. U. S.* 152 U. S. 211, 223.

² *U. S. v. Eaton*, 144 U. S. 677, 688.

³ *Carr v. Gordon*, 82 Federal Reporter 379; *Taylor v. Kercheval*, 82 Fed. Rep. 497; *Morgan v. Dunn*, 84 Fed. Rep. 551.

⁴ *Butler v. White*, 83 Fed. Rep. 578.